FLATHEAD COUNTY JUSTICE COURT

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Montana Supreme Court
Box 203003
Helena, MT 59620-3003

Re: Proposed Code of Judicial Conduct

Honorable Members of the Court:

It is with great pleasure, and a sense of reverence, that I offer the following comments on the proposed Code of Judicial Conduct. Upon adoption the Code will serve as a guide to the judiciary of this state during a significant period of history. The judicial branch of government will undergo significant changes in the years to come as it embraces technology and responds to the needs of a rapidly changing society. While the judicial system of tomorrow will likely be significantly different than the one we currently serve in, it will nonetheless remain the forum that the citizens of this state rely on to impartially decide disputes and redress grievances with the government. To that end, the Code of Judicial Conduct is crucial in shaping the courts of the state and ensuring that judges continue to conduct themselves in a manner that is consistent with traditions of the past while embracing the realities of the twenty first century.

In general, the proposed Code is a vast improvement over the existing Canons. It is written in plain language that lends itself to understanding. The comments offer practical advice and guidance in a manner that is for the most part easily understood. While it will undoubtedly be subject to future dispute and interpretation, the proposed Code provides concrete guidance while retaining the essential element, and obligation, of individual discretion. With the foregoing said I offer the following specific comments.

I. Applicability:

(A) I am of the opinion that the Code ought to clearly apply to those serving as an acting judge. Often in the Courts of Limited Jurisdiction (COLJ) the judge is called upon to appoint an acting judge to serve in the judge's absence. While serving in that capacity the acting judge ought to be bound by the Code. The title "judge pro tempore" should be defined to include those who are appointed pursuant to existing law or rules of procedure. Those individuals, while serving, are subject to the same pressures, influences as the elected or appointed judge, and ought to be bound by the Code.

II. Full-Time Judge

(B) The question of whether a judge ought to practice law is problematic. On one hand average citizens find it difficult to understand, or believe, that a judge can practice law and in doing so advocate in a court other than their own while remaining impartial and free from bias while serving in a judicial capacity. On the other hand, lawyers and judges are certainly able to separate advocacy from personal beliefs and the role of an impartial fact finder.

Because of Montana's size and geographical diversity a prohibition against a full-time judge practicing law ignores the reality of many remote jurisdictions. While the majority of COLJ are presided over by judges who are not attorneys, many are attorneys. Prohibiting a full-time judge from practicing law will undoubtedly result in smaller courts attracting only judicial candidates who are either retired attorneys, or non-attorneys. While I have great respect for, and faith in, lay judges, I fear the full-time criteria ignores the reality of the COLJ. Rather than a full-time or part-time status the deciding criteria ought to be the judge's case load and ability to perform his or her judicial duties- administrative and case related, while maintaining any sort of legal practice.

A judge serving in a jurisdiction with a large case load, whether full-time or part-time, has no business practicing law. Similarly, an attorney serving as a full-time judge in a jurisdiction with a light case load may well be able to maintain a limited law practice free of conflicts which impair his or her ability to serve as a judge.

I believe that an attorney judge sitting in a COLJ should not be prohibited from practicing law. The decision to practice ought to be the judge's after considering the ethical and professional obligations that govern the judicial position. The rules should, however, be clear that the judicial obligation is the higher obligation and that all conflicts are resolved in favor of judicial obligations.

Rule 2.2: Impartiality and Fairness

Comment [4] makes the first reference in the Code to self-represented litigants. I believe the rules ought to include an affirmative obligation to ensure that the self represented litigant has meaningful access to the courts of the state. In the past six months I have attended two major conferences on the issue of equal access and self represented litigants. It is widely accepted that it is judges who must actively embrace and promote the issues associated with the self represented if we are to provide equal and meaningful access to the courts in the twenty-first century.

Since their creation access to the courts of this state has largely been premised on the fundamental idea that both sides to any dispute would have an attorney. Lawyers and judges have been trained with this model in mind. As a result the existing perception, and for the most part reality, is that judges are merely referees who call balls and strikes based upon what is presented in court. While certainly some jurists take a more active role in ensuring that self represented litigants are well informed, for the most part the bench is reluctant to actively ensure meaningful access and participation by the self represented litigant for fear of being accused of being less that impartial. In reality this is a comfortable position for trial court judges to take as they do not have to become "involved" with the litigants.

Our rapidly changing society demands that the court system take steps to ensure that access is granted and that it is meaningful. We live in a society that has embraced a "do-it-yourself" culture.

Information technology has made legal information available to the masses. For most litigants the cost of having an attorney handle anything other than complex litigation or transactional matters is prohibitive. Further, many litigants now choose to prepare and present their case without the assistance of an attorney.

An affirmative obligation to ensure access does not require the judge to become an active participant, or to take sides. Judges should be encouraged to reach across the bench and appropriately guide self represented litigants so that matters are decided on their merits and not upon technical deficiencies resulting from a preventable omission or error. That is not to say that the court and its staff should be required or allowed to render legal advice. The courts should, however, be required to provide essential information and forms on court procedure, and judges should take those steps necessary to ensure that the self represented litigant is afforded more than a walk through a substantive and procedural minefield.

This endeavor will require a change in judicial philosophy and training at all levels. Nonetheless, these are changes that are sweeping across the nation and the judiciary must respond to them if we are to provide equal access and justice for all.

Rule 2.11: Disqualification

(C) The rule references the "record." It is unclear whether this refers to the record in a court of record or the written record that may appear in a file maintained by a court which does not maintain a verbatim record. Whether in a court of record or a COLJ which is not a court of record, it seems that a written record of the basis for a disqualification should be made and that any waiver ought to be reduced to writing and included in the court file.

Rule 3.4: Appointments to Governmental Positions

In the COLJ a judge often serves as the chief administrative officer of the court on behalf of the governmental entity. For example, a county may treat a Justice of the Peace as the department head of the Justices' Court for purposes of supervising court staff and budgeting. This unique relationship creates significant problems for judges in smaller cities and towns. The rule ought to more clearly define this role, and perhaps the comments could reflect some guidance for judges and those in the executive branch.

Rule 3.7: Participation in Educational, Religious, Charitable, . . . Activities.

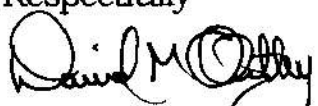
I am troubled by the breadth of the permitted activities allowed by this rule. It is necessary for a judge to be active in the community in order to have a true understanding of community values and for the public to have a sense that the judge is a member of the community. However, unlike any other member of the community judges are required and expected to be impartial and remain free of improper influence. In my experience an organization uses a judge's name and title for one of three things: (1) to establish credibility, (2) to add prestige, or (3) to influence readers to act. I believe it is unrealistic to allow the use of a judge's name and title on non-law related material and not expect that the public will be influenced by the presence of that name. Comment [4] seems to invite controversy for the judge and the judiciary as a whole.

Rule 3.10: Practice of Law

As stated earlier I view this blanket prohibition on the practice of law by a full-time judge as problematic in many respects. I am of the opinion that judges in the COLJ ought to be able to engage in the practice of law in a limited subject matter that is not one in which the judge routinely hears and decides cases. I believe the rules should make clear that it is incumbent upon the judge to ensure that his or her practice does not interfere with actual or perceived impartiality.

As stated earlier, the adoption of the new Code of Judicial Conduct is an important and significant event in the history of the judiciary in Montana. I hope that my comments are helpful in provoking thought and discussion which will ultimately result in the adoption of a set of rules which will serve to guide judges in changing times. Most importantly, I hope that the rules preserve the independence and integrity of the judiciary in an era of change.

Respectfully



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